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Condominiums and Zoning

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CONDOMINIUMS AND ZONING

As an initial step in planning the development of a condominium, the sponsor must insure that the project will meet with local zoning board approval. While few state condominium statutes or local zoning ordinances specifically provide for such zoning,[1] this is not to say that condominiums are exempt from compliance with local zoning regulations. Furthermore, the sponsor must consider the possible application of local multiple dwelling laws, as well as ascertain whether there are private covenants running with the land which restrict its use as proposed.

The immediate problem in determining how zoning regulations apply to condominiums is the determination of what is to be the critical entity for zoning purposes. It can be argued that, since individual condominium units are owned in fee simple, each unit is the entity and is to be classified as a single-family residence. On the other hand, it might be said that the entire development is the critical entity and is to be classified as a multiple dwelling. Few zoning ordinances provide guidance on this issue, and the solution is often found in the physical design of the overall project. Under such an approach — the "look alike rule" — if the condominium looks like a high-rise apartment, and rental apartment houses are in compliance with zoning ordinances, the condominium should not be treated any differently under existing zoning laws. Likewise, condominiums which visibly resemble existing garden apartments should be given similar treatment. In both cases, the entire building rather than each unit should be considered the critical entity. However, where a condominium is to be composed of townhouses or detached units arranged in clusters, and there is no "look alike" permitted in the area, the project may be thwarted by zoning laws requiring compliance with minimum lot size, setback and yard size requirements applicable to conventional single-family residences.

Another problem of entity categorization may result from classification of condominiums as multiple dwellings calling for compliance with local multiple dwelling codes. Such codes might require, for example, a resident housekeeper, peepholes in doors, fire escapes and bright lighting.[2] One writer has argued that such codes should not be

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1 For an analysis of each state condominium act and related statutes as to the application of local zoning and subdivision controls to condominiums see 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 633.32 (rev. ed. 1972) [hereinafter cited as POWELL].

2 *See, e.g.*, N.Y. MULT. DWELL. LAW §§ 37, 51-a, 53, 83 (McKinney Supp. 1973).

applied to lateral condominiums which more closely resemble private, single-family homes than rental apartments.[3]

The majority of condominium statutes which do mention the application of local zoning ordinances follow the look alike rule.[4] Some condominium statutes mandate this nondiscriminatory interpretation of zoning ordinances.[5] Other statutes require that the look alike principle be applied "unless a contrary intent is clearly expressed" in the ordinance.[6] It would thus appear that in these states discriminatory treatment of condominiums by local zoning officials is not absolutely prohibited. However, the validity of zoning ordinances which discriminate against or in favor of condominiums can be attacked on the ground that local governments should only regulate the use of property, not its ownership.[7] Of the condominium statutes which address zoning matters but do not follow the look alike rule, one simply provides that property on which a condominium is established is not relieved from compliance with local ordinances;[8] others authorize local zoning authorities to adopt supplemental rules and regulations to implement the condominium statute.[9]

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3 Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1131 (1969). Professor Schreiber doubts, however, that local authorities, who are mostly concerned with protection of the rental occupant, will insist on enforcing multiple dwelling codes against privately owned condominium units. *Id.*

4 A look alike provision is contained in the condominium statutes of the following jurisdictions: Alaska, California, Florida, Idaho, Maryland, Mississippi, Nevada, New Jersey, Texas and Washington.

5 ALASKA STAT. § 34.07.440 (1971); FLA. STAT. ANN. § 711.21 (Supp. 1973); MD. ANN. CODE art. 21, § 11-120 (1974); N.J. REV. STAT. § 46: 8B-29 (Supp. 1973); TEX. REV. CIV. STAT. art. 1301a, § 23 (Supp. 1974); VA. CODE ANN. tit. 55, ch. 4.2, § 55-79.43 (Supp. 1974); WASH. REV. CODE ANN. § 64.32.110 (Supp. 1973). Typical of the look alike statutes is the Florida statute, which provides:

> All laws, ordinances and regulations concerning buildings or zoning shall be construed and applied with reference to the nature and use of such property without regard to the form of ownership. No law, ordinance or regulation shall establish any requirement concerning the use or location, placement or construction of buildings or other improvements which are, or may thereafter be subjected to the condominium form of ownership, unless such requirement shall be equally applicable to all buildings and improvements of the same kind not then or thereafter to be subjected to the condominium form of ownership.

FLA. STAT. ANN. § 711.21 (Supp. 1973).

6 CAL. CIV. CODE § 1370 (West Supp. 1974); IDAHO CODE § 55-1524 (1969); MISS. CODE ANN. § 896.17 (Supp. 1972); NEV. REV. STAT. § 117.110 (1973). The Idaho statute, for example, provides:

> Unless a contrary intent is clearly expressed in local zoning ordinances, such ordinances shall be construed to treat like structures, lots, or parcels in like manner regardless of whether the ownership thereof is divided by sale of condominiums created in a project pursuant to this act, rather than by the lease or other disposition of such structures, lots or parcels . . . .

IDAHO CODE § 55-1524 (1969).

7 *See* text accompanying notes 11-17 *infra*.

8 MICH. STAT. ANN. § 26.50(29) (Supp. 1973).

9 D.C. CODE ANN. § 5-928 (1966); KY. REV. STAT. ANN. § 381.910 (1972); N.C. GEN. STAT. § 47A-27 (1966); TENN. CODE ANN. § 64-2721 (Supp. 1973).

While the look alike rule does not resolve every possible zoning problem for the condominium sponsor, it is, at least, fair in that it recognizes that the proper object of zoning is to regulate the use of property rather than its ownership.[10] The appeal of the look alike rule is easy to appreciate where an existing apartment building is to be converted to a condominium. The use of the property and the appearance of the building before and after the conversion are the same. Only the form of ownership has changed, and clearly, the regulation of ownership by local zoning authorities would be an unconstitutional exercise of local police power. Such regulation would bear no rational relation to the health, safety, welfare or morals of the community.[11]

Though little case law appears in the area, New Jersey courts have twice had occasion, in a condominium context, to rule on the authority of local governments to restrict land ownership. However, in neither

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Professor Rohan argues that since these statutes authorize only the adoption of regulations which would serve to implement the condominium program, zoning ordinances passed pursuant to such statutes cannot discriminate against the condominium form of property ownership. 4A POWELL ¶ 633.32, at 900.14. It should be added that neither can zoning ordinances passed pursuant to such statutes discriminate in favor of condominium ownership, since zoning authorities can only regulate the use of property and not its ownership. *See* text accompanying notes 11-17 *infra*.

[10] *See, e.g.*, Feinberg v. Southland Corp., 268 Md. 141, —, 301 A.2d 6, 11-12 (1973) ("As we have observed in prior decisions, zoning ordinances are 'concerned with the use of property and not with the ownership thereof nor with the purposes of the owners or occupants . . . .'"); Jeffery v. Planning & Zoning Bd. of Appeals, 232 A.2d 497, 499 n.2 (Conn. Sup. Ct. 1967) ("Of course zoning is concerned with the use, rather than the ownership, of property."); State *ex rel.* Parker v. Konopka, 119 Ohio App. 513, —, 200 N.E.2d 695, 696 (1963) ("Zoning ordinances or regulations have reference to land use rather than to the persons who own the land."); Dukes v. Shell Oil Co., 40 Del. Ch. 174, —, 177 A.2d 785, 792 (Ct. Ch. New Castle 1962) ("[Z]oning laws are not designed to restrict land ownership, but only land use.").

[11] In a much criticized case, Clemons v. City of Los Angeles, 36 Cal. 2d 95, 222 P.2d 439 (1950), the California Supreme Court upheld a local zoning ordinance which, in effect, restricted the ownership of property. The particular ordinance in question prohibited the reduction of land ownership into lots of less than 5000 square feet; it also required a minimum of 800 square feet per dwelling unit. The plaintiff, who had been renting nine bungalows on his property, divided the property into nine lots, each having one bungalow and an area of 925 square feet, and sold eight of the lots to various parties. Threatened with prosecution, the plaintiff sought declaratory and injunctive relief on the grounds that enforcement of the ordinance would be beyond the legitimate scope of the local police power and would violate his constitutional rights. The court upheld the ordinance as a valid exercise of local police power for the prevention of "overcrowding" and "slum conditions," which would allegedly result from a lack of uniform control and repair. *Id.* at —, 222 P.2d at 442-43.

The *Clemons* decision has been criticized for not having squarely faced the fact that the ordinance in question restricted land ownership. *See* 4A POWELL ¶ 633.32, at 899 n.9; 64 HARV. L. REV. 326, 327 (1950). In addition, one commentator has noted that the possible deterioration which concerned the *Clemons* court would not be likely to occur in a condominium, which features unified management and maintenance. Welfeld, *The Condominium and Median-Income Housing*, 31 FORDHAM L. REV. 457, 468 (1963).

A similar ordinance was later struck down by a lower California court when no such justification could be found. *See* Morris v. City of Los Angeles, 116 Cal. App. 2d 856, 254 P.2d 935 (1953).

case were constitutional issues discussed. In *Bridge Park Co. v. Borough of Highland Park*,[12] the plaintiff made plans to convert a garden apartment complex to a condominium. Town officials informed him that this action would be contrary to local zoning ordinances in that a "garden apartment" complex, based on its definition in the ordinances, must remain under single ownership. After being denied declaratory and injunctive relief, the plaintiff appealed. The appellate court reversed, holding that under the state zoning enabling statute the town had authority to regulate only the use of property and not its ownership.[13] The court read the term "use" in the statute as meaning "physical use" and concluded that "[a] building is not 'used' as a condominium for purposes of zoning."[14] In *Maplewood Village Tenants Association v. Maplewood Village*,[15] the court, citing *Bridge Park* and the look alike rule contained in the New Jersey condominium statute, held that the conversion of an apartment house to a condominium did not require the approval of local zoning authorities because, "[i]t is use rather than form of ownership that is the proper concern and focus of zoning and planning regulation."[16] Though the cases did not reach the underlying constitutional issues, the conclusions of the courts in both cases are logically compelling.

Besides resorting to court remedies when local zoning authorities disapprove of the condominium form of ownership, the sponsor may be able to avoid expensive litigation by obtaining administrative relief such as a variance.[17] In some jurisdictions, however, the seeking of administrative relief from the requirements of local zoning ordinances

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12 113 N.J. Super. 219, 273 A.2d 397 (App. Div. 1971).

13 *Id.* at —, 273 A.2d at 398.

14 *Id.* at —, 273 A.2d at 399.

15 116 N.J. Super. 372, 282 A.2d 428 (Ch. Div. 1971).

16 *Id.* at —, 282 A.2d at 431. For similar statements see the cases cited in note 10 *supra*.

17 A successful attempt to obtain a variance by a real estate investor interested in converting an existing rental project to a condominium is described in 4A POWELL ¶ 633.32, at 900.25 & n.104. A local ordinance required that land under multiple dwellings in a particular zone remain under single ownership. The investor made the required showing of hardship and presented the following argument for a variance, as outlined by Professor Rohan:

> It was argued that a conversion to condominium status would not violate the basic purpose of the zoning ordinance. It is true that each purchaser would own his unit individually and become a co-owner of the land under the building. However, under the New York Real Property Law § 339(i) partition of the land owned by a condominium is prohibited. Therefore the land and building would remain in its present condition as long as a condominium existed. Accordingly, condominium ownership could not have been the type of situation the ordinance was intended to prevent. This conclusion was reinforced by the fact that the condominium statute was enacted several years after the ordinance in question. Nor would any change in use occur by such conversion.

Id. at n.104.

may constitute an admission of their validity.[18] Whether the problem is discriminatory treatment or the absence of a look alike structure in the area, possible solutions, besides a request for a variance, include requests for a special permit or an amendment to the zoning ordinance.[19] However, all involve uncertainty, time consumption and expense. Much of this would be alleviated if local zoning ordinances were revised to provide expressly for condominiums in a nondiscriminatory manner.

It should be noted that the condominium sponsor, in striving to obtain zoning board sanction, must not ignore the possibility that there are restrictive covenants running with the property which prohibit the construction of a condominium. The validity and enforceability of restrictive covenants are not affected by local zoning ordinances or local zoning board action.[20] If the property is so burdened, the look alike approach can be employed to the condominium sponsor's detriment, as was demonstrated in the recent case of *Callahan v. Weiland*.[21] In

18 *See* Rubin v. Board of Directors, 16 Cal. 119, 104 P.2d 1041 (1940); Piccolo v. Town of West Haven, 120 Conn. 449, 181 A. 615 (1935); Drabble v. Zoning Bd., 52 R.I. 228, 159 A. 828 (1932).

19 Obtaining an informal opinion letter from the zoning board, and application for a building permit have also been suggested as possible approaches. *See* 1 THE CONDOMINIUM REP., Dec., 1973, at 8. In one noted work the authors explain that in some situations

> [t]he locality may issue permits and withhold injunctive action in order to build a precedent by administrative action or inaction, rather than raise a hailstorm by ruling on the need for new ordinances or variances that require public hearings for what will not produce look-alike housing.

D. CLURMAN & E. HEBARD, CONDOMINIUMS AND COOPERATIVES 29-30 (1970).

A good illustration of how the look alike rule may be applied by zoning authorities in considering a request for approval of a condominium project is found in the case of Wentworth Hotel, Inc. v. Town of New Castle, 287 A.2d 615 (N.H. Sup. Ct. 1972). There the plaintiff owned a resort hotel on 50 acres and operated it as a nonconforming use in an area zoned partially for one single-family house per acre and partially for one two-family residence per 10,000 square feet. After a fire had destroyed one wing of the hotel, the plaintiff planned to construct a condominium complex, which would consist of a 104 unit structure to replace the razed wing and an additional 176 units on ground previously vacant. The local zoning board granted the plaintiff's request for a variance as to the structure to replace the hotel wing, but denied its application as to the rest of the units. On appeal, the plaintiff insisted that it was not requesting a use for apartments but a residential use not known at the time the ordinance was enacted and, therefore, not covered by it. The court upheld the partial granting of the variance as to the 104 unit structure on the ground that the construction of such structure would not substantially enlarge the use of the land. *Id.* at 618. However, the court also upheld the denial of the plaintiff's request as to the remaining units. *Id.* at 619. Finding that the use of the land as proposed by the plaintiff would result in more of a population concentration than would the uses permitted by the ordinances, the court was of the opinion that "[a]lthough the ownership may be different, condominium dwellings of the type contemplated are not unlike apartment dwellings so far as the actual use of the land is concerned." *Id.* at 618.

20 Whiting v. Seavey, 159 Me. 61, 188 A.2d 276 (1963); Murphey v. Gray, 84 Ariz. 299, 327 P.2d 751 (1958); Strauss v. Ginzberg, 217 Minn. 57, 15 N.W.2d 130 (1944).

21 279 So. 2d 451 (Ala. 1973).

Callahan, the use of the property in issue was subject to a restrictive covenant which provided that

> no building, except a single dwelling house . . . shall be erected or maintained on said property . . . it being intended hereby to prohibit . . . on said premises any . . . apartment house, double or duplex house . . . .[22]

The granting of an injunction against the construction of a 10-story condominium was affirmed by the Alabama Supreme Court. The owner of the property argued that the restriction against apartment houses should not be deemed to apply to condominiums since condominiums were unknown in the state at the time the restrictions were written. He also contended that a condominium is but a single residence. The court determined that the intent of the covenant was to prevent an overdensity of population and that the construction of any multi-unit dwelling, whether called an apartment or a condominium, would be contrary to this intent.[23] The court held that "a condominium is within the scope and meaning of the word 'apartment house' as it appears in the restrictive provision . . . ."[24] It has been noted in one topical report that, although the *Callahan* decision is sound on the facts presented, it is less clear whether other commonly used covenants would prohibit the erection of a condominium.[25] The report suggests that a covenant simply restricting the property to "one-family homes" should not bar townhouse condominiums.[26] However, a court might well decide that the construction of attached condominium units would greatly increase population density in violation of the intent of a covenant entered into by the owners of detached single-family homes.

Reliance upon the look alike rule does not fulfill the need for zoning ordinances which specifically allow for various types of condominium developments. It is true that where a proposed condominium clearly resembles an approved existing structure, use of the rule should produce an equitable result.[27] However, the look alike rule is often of little

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22 *Id.* at 453.

23 *Id.* at 457.

24 *Id.*

25 1 THE CONDOMINIUM REP., Dec., 1973, at 8.

26 *Id.*

27 For example, a high-rise condominium should be treated, for zoning purposes, the same as a high-rise apartment building. Unfortunately, under some local community planning programs, apartment buildings are often placed in less desirable locations, sometimes at the edge of a ghetto area in order to serve as a buffer. *See* D. CLURMAN & E. HEBARD, CONDOMINIUMS AND COOPERATIVES 30 (1970).

The argument might be made that high-rise condominiums should be given more favorable treatment than the apartment buildings they resemble on the ground that they are less detrimental to community stability. In other words, it might be said that con-

value when applied to lateral condominiums, especially those of the open-space cluster type. Very often there are no similar developments with which they may be compared. To require that condominiums comply with zoning regulations applicable to conventional single-family homes is very often unrealistic. Blanket classification of all condominiums as multiple dwellings is also inappropriate.

To encourage increasingly popular cluster developments, flexible zoning provisions should be adopted by local zoning boards. These provisions would focus on the overall use of property rather than on the characteristics of individual dwelling units. Density and bulk controls would concentrate less on minimum frontage, lot sizes and yard sizes, and more on maximum number of families per acre and maximum percentage of the total lot that can be occupied. Height controls would, likewise, allow for some flexibility. The consequent availability of large open expanses for recreational, aesthetic and environmental purposes affords broad creative potential. Rentals, as well as condominiums, would, of course, be permitted as long as the applicable criteria were met.

In revising local ordinances to facilitate condominium development, zoning authorities should survey the monotonous landscape which has resulted from inflexible zoning ordinances designed to preserve the character, beauty and homogeneity of neighborhoods. They may realize that stimulation of condominium development could provide the more varied residential patterns which many neighborhoods sorely need.[28]

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dominium residents, having an investment in the property, are probably less transient than apartment dwellers, and are more likely to take good care of the property and to become active in community affairs. While this argument may have logical appeal, it alone would not justify zoning discrimination favoring condominiums since property use rather than ownership is the proper object of zoning controls. *See* text accompanying notes 11-17 *supra*.

28 *See* D. CLURMAN & E. HEBARD, CONDOMINIUMS AND COOPERATIVES 30-31 (1970).